Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

DISABLED RIGHTS ACTION COMMITTEE,

Petitioner,

v.

ARCHON CORPORATION,
formerly Santa Fe Gaming Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A complaint was filed in United States District Court. The complaint alleged a federal claim (a violation of Title III of the Americans with Disabilities Act of 1990, or "ADA"), and alleged no state law cause of action. The federal claim was the subject of: (1) briefing before the District Court; (2) the decision of the District Court; (3) briefing before the Court of Appeals; and (4) oral argument before the Court of Appeals. A state law cause of action was not mentioned at any point in the pleading, briefing, or argument of the case. In the Court of Appeals' disposition affirming the District Court's grant of dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court of Appeals did not address the issue presented for review (the scope of remedies available regarding a violation of Title III of the ADA). Instead, the disposition of the Court of Appeals was limited to a pronouncement that relief for a particular state law claim (common law "unjust enrichment") was not available under the facts alleged in the complaint.

The question presented is whether a Court of Appeals may affirm dismissal of the case by ignoring the federal issue presented for review and, accordingly, by ignoring that court's duty to hear and decide the case.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is the Disabled Rights Action Committee, a Utah nonprofit corporation having members residing in Las Vegas, Nevada. Plaintiff is a member-based organization, and has no stock nor any corporate affiliations. The Disabled Rights Action Committee was one of the Plaintiffs in the District Court, and one of the Appellants in the Ninth Circuit Court of Appeals.

The other Plaintiff in the District Court, and Appellant in the Ninth Circuit Court of Appeals, was an individual member of the Disabled Rights Action Committee, Ronald Ray Smith. Mr. Smith is now deceased.

Respondent

Respondent, Archon Corporation, is a publicly traded Nevada corporation, which was formerly known as "Santa Fe Gaming Corporation." Archon Corporation (under the name "Santa Fe Gaming Corporation") was the Defendant in the District Court, and was the Appellee in the Ninth Circuit Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Disabled Rights Action Committee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Memorandum decision of the Ninth Circuit (Appendix ("App.") A at 1a-3a) is designated as "unpublished" (but is available at 2002 U.S. App. LEXIS 4803; and 32 Fed. Appx. 820). The opinion of the District Court (App. B at 4a-7a) is also unpublished (but is available at 2000 U.S. Dist. LEXIS 22119).

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on March 20, 2002. App. A at 1a. A timely Petition for Rehearing and Rehearing En Banc was filed and those petitions were denied on August 8, 2002. App. C at 8a-9a.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The case, as it was presented to the Ninth Circuit, sought review of the District Court's construction of certain statutory provisions regarding the enforcement, by citizen suits, of Title III of the Americans with Disabilities Act of 1990 ("ADA"). The question presented to this Court in this Petition, however, involves 28 U.S.C. § 1291, which provides that: "The courts of appeals . . . shall have jurisdiction of appeals from all

final decisions of the district courts of the United States."

STATEMENT OF THE CASE

On June 19, 2000, the Disabled Rights Action Committee (along with Mr. Ronald Ray Smith, one of its members residing in Las Vegas) (collectively, "Disabled Rights") filed a Complaint against Santa Fe Gaming Corporation[1] ("Santa Fe") in the United States District Court for the District of Nevada. The Complaint alleged[2] that Disabled Rights' members were injured (in the form of injuries to dignity interests) by Santa Fe's ongoing violation of Title III of the ADA (in the form of its operation of an inaccessible shuttle bus system from the Santa Fe Hotel & Casino, a property which was owned by Santa Fe). App. D at 13a.

As a remedy for the violation of Title III of the ADA (which was mistakenly presented as a separate cause of action), the Complaint sought an "Accounting for Unjust Enrichment" based upon "the full application of the principles of equity." Specifically, Disabled Rights alleged that Santa Fe's "employment of a shuttle bus system confers an economic benefit to Defendants, and Defendants' delay in retrofitting [an inaccessible bus] gives Defendants the associated time value of money." App. D at 14a. Significantly, Disabled Rights sought an order requiring Santa Fe to "disgorge . . . economic gain reaped by . . . illegal conduct." App. D at 14a.

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[1] On May 11, 2001, Santa Fe Gaming Corporation changed its name to "Archon Corporation."

[2] In considering motions to dismiss, courts "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n 1 (2002) (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993)).

Clearly, "disgorgement" was requested and *the Complaint did not make out a claim for "unjust enrichment" in the form of an implied in fact contract under state law.*

On September 15, 2000, Santa Fe moved for dismissal of the claim for an "accounting for unjust enrichment" under Federal Rule of Civil Procedure 12(b)(6). The basis for Santa Fe's motion was that the claim did not constitute a "cognizable legal theory" in light of the Ninth Circuit's *dicta* in *Fischer v. SJB-P.D. Inc.*, 215 F.3d 1115, 1120 (9th Cir. 2000) stating that 42 U.S.C. § 2000a-3(a) (which is incorporated by reference into the private enforcement provision of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12188(a)(1)) does not provide for "monetary relief." *Santa Fe's motion did not in any way seek to characterize the Complaint as making out a claim for "unjust enrichment" in the form of an implied in fact contract under state law.*

On October 2, 2000, Disabled Rights filed an opposition to the motion to dismiss. Disabled Rights noted the high standard set for motions to dismiss, and that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of [its] jurisdiction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). *Disabled Rights' opposition did not in any way seek to characterize the Complaint as making out a claim for "unjust enrichment" in the form of an implied in fact contract under state law.*

On October 12, 2000, Santa Fe filed its reply in support of the motion to dismiss.[3] That reply sought to equate the

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[3] At page 5 of its reply, Santa Fe notified the District Court of an asset sale that took place on or about October 2, 2000, whereby the subject buses "previously used at the Santa Fe Hotel & Casino became the property of Station Casinos, the new owner of the

equitable monetary relief that was sought with damages, but *Santa Fe's reply did not in any way seek to characterize the Complaint as making out a claim for "unjust enrichment" in the form of an implied in fact contract under state law.*

On December 15, 2000, the district court entered its Order granting Defendant's Motion to Dismiss Cause of Action for Unjust Enrichment. App. B at 4a. Stating that disgorgement of wrongful gains constitutes a form of "monetary relief" (without distinguishing between equitable and legal monetary relief), the District Court relied solely upon *dicta* in *Fischer v. SJB-P.D. Inc., supra* at 1120, which states that 42 U.S.C. § 2000a-3(a) does not provide for "monetary relief." App. B at 6a-7a. *The District Court's decision clearly recognized that the "disgorgement" remedy was at issue, and did not in any way characterize the Complaint as making out a claim for "unjust enrichment" in the form of an implied in fact contract under state law.*

On February 28, 2001, the Complaint of Disabled Rights was dismissed and final judgment was entered in the case. The Complaint was dismissed "for failure to state a claim upon which relief can be granted and for mootness."[4]

On appeal, Disabled Rights noted: (1) that 42 U.S.C. § 12188(a)(1) does not preclude equitable forms of monetary relief (App. E at 19a-22a); (2) that 42 U.S.C. § 2000a-3(a) does

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Santa Fe Hotel & Casino." The asset sale thus rendered moot any prospective injunctive relief that might have been ordered in the case.

[4] The mootness of any claim for prospective injunctive relief against Santa Fe was attributable to the asset sale of October 2, 2000. Dismissal of that claim was according to Rule 41(a)(2) of the Federal Rules of Civil Procedure, and was pursuant to Disabled Rights' concession that mootness was applicable to any claim for prospective injunctive relief against Santa Fe.

not restrict equitable jurisdiction (App. E at 23a-28a); (3) that the disgorgement remedy is consonant with the purpose of the ADA (App. E at 28a-30a); (4) that the disgorgement remedy is consonant with enforcement through private attorneys general (App. E at 30a-31a); and (5) that the disgorgement remedy would give flexibility to district courts to remove incentives for continuing violations (App. E at 31a-33a). Most significantly, Disabled Rights distinguished "disgorgement" (the purpose of which is "to deprive a person of 'ill-gotten gains' and prevent unjust enrichment") from "damages" which are to "make whole" aggrieved parties, see App. E at 33a-34a, *and Disabled Rights did not in any way seek to characterize the Complaint as making out a claim for "unjust enrichment" in the form of an implied in fact contract under state law.*

On February 12, 2002, at oral argument before a panel of the Ninth Circuit, *neither of the parties nor any member of the panel addressed the issue submitted for review in the context of a claim for "unjust enrichment" in the form of an implied in fact contract under state law.*

On March 20, 2002, the Ninth Circuit's panel issued its Memorandum decision affirming the District Court's dismissal. The decision stated that:

> Plaintiffs have not stated a cognizable claim for unjust enrichment. They do not allege that defendant Santa Fe gained profits from its alleged ADA violation that properly belonged to the plaintiffs. *See, e.g., Oregon Laborers-Employees Health & Welfare Trust Fund v. Philip Morris,* 185 F.3d 957, 968 (9th Cir. 1999) (stating that "to state a cause of action for unjust enrichment, plaintiffs must show that they conferred a 'benefit' on defendants and that it would be unjust for defendants

to retain that benefit").

App. A at 2a.

Thus, the Ninth Circuit ignored the federal claim that was presented, and treated the Complaint *as setting forth a state law claim*[5] *for "unjust enrichment" in the form of an implied in fact contract.*

Disabled Rights timely petitioned the Ninth Circuit for rehearing and rehearing *en banc*, which petitions for rehearing were denied on August 8, 2002. App. C at 8a-9a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The Ninth Circuit's decision is based upon a reading of the Complaint as making out a claim for "unjust enrichment" under state law. What was intended by Disabled Rights (and what was *understood* by the litigants and the District Court) was that Disabled Rights was seeking disgorgement as a remedy for a violation of Title III of the ADA. The only facts needed to be plead for the application of the remedy of the disgorgement of wrongful gains is for there to be (1) a gain[6]

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[5] Significantly, the sentence from *Oregon Laborers-Employees Health & Welfare Trust Fund v. Philip Morris*, 185 F.3d 957 (9th Cir. 1999) that was quoted by the Ninth Circuit in the decision below began with the (omitted) words: "Under Oregon law," and the quoted language was under the heading "State Law Claims." *Id.* at 968.

[6] Or an avoidance of a loss, which is termed "negative unjust enrichment." *See, Reich v. Continental Casualty Co.*, 33 F.3d 754, 756 (7th Cir. 1994) (citing 1 D. DOBBS, LAW OF REMEDIES § 509, pp. 802-03 (2d

which is (2) wrongful.[7] These facts were plead in the Complaint. App. D at 13a-14a.

Courts of appeals other than the Ninth Circuit have found that substantial justice in construing pleadings is achieved by *ignoring* missteps in terminology.[8] *See, e.g., Alexander v. Unification Church of America*, 634 F.2d 673, 678 (2nd Cir. 1980) ("It is not material, under the liberal rules of federal pleading, that Count One was mislabeled by appellants' counsel."); *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113, 124 (3rd Cir. 1998) (dismissal of ADA claim due to "inartful pleading" is "the precise sort of pleading as a highly developed form of art that the federal rules sought to abandon.")

A recent unanimous decision of this Court shows that the approach taken by the Second Circuit and the Third Circuit is more consistent with the Federal Rules of Civil Procedure,

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ed. 1993)).

[7] Whether the wrongful gain is to actually be disgorged (and *to whom* it is disgorged) is a matter for the district court's discretion. Disabled Rights requested, in the Complaint, that the District Court exercise that discretion for the direct benefit of Disabled Rights, but (as is plain from the pleadings, *see* App. E at 33a (citing *S.E.C. v. First Pacific Bancorp*, 142 F.3d 1186, 1192 (9th Cir. 1998))), Disabled Rights in no way sought to *restrict* the District Court's discretion.

[8] The labeling of the remedy as "unjust enrichment" (instead of as "disgorgement") would not appear to even be a "misstep" under earlier Ninth Circuit precedent. In *SEC v. First Pacific Bancorp*, 142 F.3d 1186 (9th Cir. 1998), the Ninth Circuit recognized that the term "unjust enrichment" is not limited in application to implied in fact contracts. See, *id.*, at 1192-93 (in enforcement of securities laws, "scholastic" distinction between "restitution" and "disgorgement" is of no consequence where wrongdoers were found to have been "unjustly enriched.")

especially under "Rule 8(a)'s simplified pleading standard" and under the "[o]ther provisions of the Federal Rules of Civil Procedure [that] are inextricably linked to Rule 8(a)'s simplified notice pleading standard." *Swierkiewicz v. Sorema* N.A., 534 U.S. 506, 513 (2002). In particular, "Rule 8(e)(1) states that '[n]o technical forms of pleading or motions are required,' and Rule 8(f) provides that '[a]ll pleadings shall be so construed as to do substantial justice.'" *Swierkiewicz v. Sorema* N.A., *supra* at 513-14.

Even if the Ninth Circuit was correct in requiring a technical form of pleading for the disgorgement remedy sought by Disabled Rights, the proper course of action for the Ninth Circuit was not to simply affirm the District Court's dismissal. Given "the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Swierkiewicz v. Sorema* N.A., *supra* at 514, quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Clearly, a technicality in semantics could easily be remedied by amending the Complaint, and the Ninth Circuit, in adopting a technical form of pleading, should have remanded the case to the District Court for entry of an appropriate order *granting Disabled Rights leave to amend* in order that Disabled Rights would have an opportunity to meet the *form* of pleading required by the Ninth Circuit.

II. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

A. This Court has Held that Plaintiffs Control their Complaints.

In *Bell v. Hood*, 327 U.S. 678 (1946), the Court considered the argument that a district court's dismissal of a

civil rights complaint for want of federal jurisdiction was proper where "the complaint states a cause of action for the common law tort of trespass made actionable by state law and that it therefore does not raise questions arising 'under the Constitution or laws of the United States.'" *Bell v. Hood*, 327 U.S. at 680-81. The Court rejected that argument, stating that:

> Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it was drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments. . . Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent "the party who brings a suit is master to decide what law he will rely upon and . . . does determine whether he will bring a 'suit arising under' the . . . [Constitution or laws] of the United States by his declaration or bill."

Bell v. Hood, 327 U.S. at 681 (quoting *The Fair v. Kohler Die Co.*, 228 U.S. 22, 25 (1913)).

This Court has held that whether a complaint states a claim "arising under" federal law must "be ascertained by the legal construction of [the plaintiff's] allegations, and not by the effect attributed to those allegations by the adverse party." *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 460 (1894)). Most recently, this point of law was reiterated by this Court in *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. ___, ___, 122 S.Ct. 1889, 1894-1894 (2002).

In the decision below, the Ninth Circuit, *without being requested to do so by any litigant*, re-characterized the Complaint

as seeking relief under an implied in fact contract theory of "unjust enrichment" (a state law claim)instead of as preventive relief to enforce Title III of the ADA. Thus, the Ninth Circuit's decision effects a more egregious judicial "redraft" of a complaint than that which was rejected by this Court in *Bell v. Hood (*where the lower court characterized the complaint as making out a state law claim *at the urging of the defendant).* The Ninth Circuit's *sua sponte* redraft of the Complaint is plainly contrary to this Court's decisions in *Hormel v. Helvering,* 312 U.S. 552, 556 (1941) ("it is . . . essential . . . that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence") and *Singleton v. Wulff,* 428 U.S. 106, 120 (1976) ("even assuming that there is no such evidence, [litigants] should have the opportunity to present whatever legal arguments [they] may have.")

The issue that was determinative of the Ninth Circuit's decision (state law "unjust enrichment") was never argued by Santa Fe nor by Disabled Rights and was never suggested by either the District Court in its Order on the Motion to Dismiss or by the Ninth Circuit at oral argument. Before the Ninth Circuit filed its Memorandum decision, there was absolutely no indication that the Complaint would *ever* be construed as making out a state law cause of action (let alone as *only* making out a state law cause of action). Clearly, the Ninth Circuit's action was contrary to well-established precedent of this Court.

B. This Court has Held that Circuit Courts of Appeals have a Duty to Decide Cases Presented to Them for Review.

In *Lutcher & Moore Lumber Co. v. Knight,* 217 U.S. 257 (1910), this Court was presented with a case that was very similar to the case presented here. In *Lutcher & Moore,* the

parties had tried a case based upon a contract theory, and(after a jury trial) a decision had been entered for the plaintiff. On appeal, the defendant sought review by the Fifth Circuit of "the many questions raised in the trial court." *Id.* at 264.

The Fifth Circuit affirmed the judgment of the trial court by way of a *per curium* opinion which, in its entirety, stated:

> 'By the court: After a thorough and attentive consideration of the questions raised on this writ, we are of opinion that the matters of defense relied upon by plaintiffs in error on the trial below, in so far as they were not given consideration, were of an equitable nature, not cognizable in a court of law. We therefore affirm the judgment of the circuit court.'

Id. at 264, quoting *Lutcher & Moore Lumber Co. v. Knight*, 84 C. C. A. 679, 156 Fed. 1022 (5th Cir. 1907).

The Supreme Court noted that "the effect of the action of the circuit court of appeals was substantially to deny to [the defendants] their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard."[9] *Lutcher & Moore Lumber Co. v. Knight*, 217 U.S. at 267. The Court then observed that:

> The great purpose of the [Circuit Courts of Appeals] act of 1891 [26 Stat. at L. 826, chap. 517, U.S. Comp. Stat. 1901, p. 488], however, to which all its provisions are subservient, is to distribute the jurisdiction of the

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[9] In the case submitted for review in this Petition, the Ninth Circuit did not remand the case to the District Court for entry of an order granting leave to amend. The effect of the action of the Ninth Circuit has been to effectively deny Disabled Rights its day in court.

> courts of the United States, and thus to relieve the docket of this court by casting upon the circuit courts of appeal *the duty of finally deciding the cases over which the jurisdiction of those courts is by the act made final.* The power to issue certiorari in accordance with the act, in its essence, *is only a means to the end that this imperative and responsible duty may be adequately performed.*

Lutcher & Moore Lumber Co. v. Knight, 217 U.S. at 267-268.

The Court held that "the judgment of the circuit court of appeals must be reversed, and the case be remanded to that court, to the end that the duty to hear and decide it may be performed," *Id.* at 268, and noted that "To hold otherwise would be repugnant to the plain intent of the act of 1891, since it would recognize a practice by which the concededly essential purpose of the act of 1891 could be disregarded or be made practically of no avail." *Id.*

The provision of the Circuit Courts of Appeals Act of 1891 that this Court found so essential was Section 6, which states "[t]hat the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court . . . and the judgments or decrees of the circuit courts of appeals shall be final." 26 Stat. at L. 826, 828. While subsequent acts of Congress have superceded the Circuit Courts of Appeals Act of 1891, the delegation to the circuit courts of appeals of "the *duty* of finally deciding the cases over which the jurisdiction of those courts is . . . made final" has not been extinguished: the circuit courts of appeals are *still* given final jurisdiction over cases, *see*, 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."), and the circuit courts of appeals are still obligated to decide the cases presented to them for review.

Furthermore, cases where this Court has recognized the duty of circuit courts of appeals to address the issues presented to them for review are not confined to old cases such as *Lutcher & Moore, supra*. *See, e.g., Terrell v. Morris*, 493 U.S. 1, 3 (1989) ("The Sixth Circuit, by its unpublished opinion, affirmed a decision that the District Court never made, and so never reviewed that court's actual decision. Review of the . . . issues should be undertaken based on a correct formulation of the ruling in the District Court");[10] *Proctor v. Warden*, 435 U.S. 559, 560 (1978) (Noting that the *per curiam* order of the circuit court of appeals had "nothing whatsoever to do with the petitioner's case. He had filed a petition for a writ of habeas corpus, not a civil rights action under 42 U.S.C. § 1983. He had sought relief in a federal court in Maryland, not one in North Carolina" and that the only case cited by the circuit court of appeals in its *per curium* order was "wholly unrelated to the petitioner's case."); *Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970) ("when attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court.").

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[10] The dissent in *Terrell v. Morris* considered the issue presented to the Court to be "simply a case of an appellate court affirming a district court's dismissal on a legal basis different from that adopted by the district court – a not uncommon practice." *Terrell v. Morris*, 493 U.S. 1, 4 (1989) (REHNQUIST, C.J., dissenting). In this case, however, the Ninth Circuit affirmed the District Court's dismissal based on the inapplicability of the allegations of the Complaint to a cause of action that was *never submitted for review* while ignoring the issue that *was* submitted for review. Hopefully, the Ninth Circuit's course of action in *this* case is a very *un*common practice. It may be, however, that courts of appeals *commonly* avoid their duty to decide the cases presented to them for review (by judicial "redrafting" of complaints or by other means). If so, then the importance of granting the writ of certiorari to exercise this Court's supervisory power is indicated all the more.

III. THE FEDERAL QUESTION PRESENTED IS IMPORTANT.

A. The Issue That Was Presented to the Ninth Circuit for Review is Important.

In *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001), this Court determined that the "catalyst" theory for awards of attorneys fees in civil rights lawsuits (including suits brought under Title III of the ADA) was not a permissible rationale under the "prevailing party" language of the relevant statutes. *Id.* at 607-608.

In the wake of *Buckhannon*, the enforcement of civil rights laws is in a state of disarray as some defendants have, particularly in cases involving Title III of the ADA,[11] been *encouraged* to "unilaterally moot[] an action before judgment in an effort to avoid attorneys fees" which this Court foresaw as "materializ[ing] in claims for equitable relief." *Id.* at 608-609. Indeed, in ADA cases in particular (where plaintiffs are more likely to die during the often long course of litigation), an effort by a defendant to "unilaterally moot" a case may not

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[11] In another case that has been presented by Disabled Rights to this Court for a writ of certiorari, the Ninth Circuit has affirmed a district court's finding moot a claim under Title III of the ADA alleging ongoing discriminatory conduct. *See Disabled Rights Action Committee v. Fremont Street Experience Limited Liability Company*, 44 Fed.Appx. 100 (9th Cir. 2002), *petition for cert. filed* Oct. 21, 2002 (No. 02-625). The determination of mootness was based upon a heretofore unrecognized power of the District Courts to disregard, as "late filed," affidavits submitted in opposition to a motion for summary judgment *over 20 days before the hearing* on the motion for summary judgment (the rationale for the "late filed" characterization being that the affidavit provided evidence of instances of an ongoing violation that were not identified in the complaint). *Id.*

even be needed.[12] A disgorgement remedy, while not providing "damages," can nevertheless foreclose what this Court clearly recognized, in *Buckhannon*, as a potential problem inherent in the abolition of the "catalyst theory" for awards of attorneys fees.

Moreover, the matter submitted to the Ninth Circuit for review involved language ("preventive relief, including an application for a permanent or temporary injunction, or other order") that is *identical* to language found in no fewer than five other federal remedial schemes.[13] Thus, the issue that the Ninth Circuit aggressively avoided has implications beyond the private enforcement of Title III of the ADA. Indeed, the issue presented to the Ninth Circuit (the availability of disgorgement under a district court's inherent equitable power) is closely related to an issue (the distinction between legal and equitable restitution) that this Court found worthy of addressing this year. *See, Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). Clearly, these are issues of importance that merit this Court's attention.

Finally, the Ninth Circuit's decision is at odds with the ADA's purpose of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). If circuit courts of appeals will not even hear and decide an appeal of the dismissal of a claim under Title III of the ADA,

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[12] In fact, one of the litigants in this case, Mr. Smith, died while the Ninth Circuit was deliberating the petitions for rehearing.

[13] *See, e.g.*, 7 U.S.C. § 2305(b)(agricultural unfair trade practices), 42 U.S.C. § 1971 (voting rights), 42 U.S.C. § 2000a-5 (Title II of Civil Rights Act of 1964, enforcement by the Attorney General), 42 U.S.C. § 3614(c)(1)(fair housing enforcement by private citizens), and 42 U.S.C. § 3614(d)(1)(A)(fair housing enforcement by the Attorney General).

then the ADA's mandate cannot be heeded.

B. The Duty of the Circuit Courts of Appeals to Hear and Decide Cases Presented for Review is of Critical Importance.

No matter the importance that may be attributed to the matter presented for review to the Ninth Circuit, Disabled Rights submits that the Ninth Circuit's *failure to decide* the case is of even greater significance.

Indeed, while the reasons that moved this Court to issue a GVR order in *Lutcher & Moore Lumber Co. v. Knight, supra*, are present on this case, the imperative duty of the circuit courts of appeals to hear and decide the cases submitted to them is arguably of *greater* significance in 2002 than it was in 1910. As the number of federal lawsuits has increased (occasioned by both the expansion of the federal judiciary's role in the protection of rights and by the increase in population of the United States), the likelihood of review by this Court has diminished. Furthermore, many circuit courts today have court rules (*e.g.*, Ninth Cir. Rule 36-3) that enable circuit courts to designate certain opinions as unpublished decisions, which designation effectively consigns the decision to precedential oblivion. Ideally, of course, "[n]onpublication must not be a convenient means to avoid review." *Smith v. United States*, 502 U.S. 1017, 1020 n. (1991) (BLACKMUN, J., dissenting). In practice, however, nonpublication *does* diminish the likelihood that this Court will review a decision of a circuit court of appeals. Thus, in 2002, the circuit courts' "duty to hear and decide" the cases presented for their review is of *greater* importance than in 1910 as the dispositions of the circuit courts of appeals have become more "final" (in a practical sense) over the years.

The importance of the circuit courts' hearing and

deciding the cases that are properly presented to them for review extends beyond the interests of the litigants. This Court typically relies on the circuit courts to study issues prior to this Court's addressing the issues. *See, McCray v. New York*, 461 U.S. 961, 963 (1983) (STEVENS, J., respecting denial of petitions for writs of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow [other courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court."). If the circuit courts do not decide the cases of first impression (such as the case below) which are properly presented for review, then it is quite possible that important questions of law will remain unanswered for extended periods or, if circuit courts of appeals steadfastly and consistently refuse to decide on the issues, will never be answered at all.

IV. THE NINTH CIRCUIT'S FAILURE TO EXERCISE ITS DUTY TO DECIDE THE CASE PRESENTED TO IT CALLS FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The Ninth Circuit, in affirming the constitutionality of its rule prohibiting citation to unpublished dispositions, has recently opined that "[s]ufficient restrictions on judicial decisionmaking exist to allay fears of irresponsible and unaccountable practices such as 'burying' inconvenient decisions through nonpublication." *Hart v. Massanari*, 266 F.3d 1155, 1177 n.35 (9th Cir. 2001). Certainly, some procedures within circuits (such as the petition for an *en banc* rehearing which Disabled Rights made to the Ninth Circuit) provide *some* restrictions on judicial decisionmaking, but this case presents a clear example of the insufficiency of those restrictions.

Over the past two years,[14] there has been considerable interest in the constitutionality of unpublished opinions. On June 27, 2002, a hearing was held on "Unpublished Judicial Opinions" before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary of the United States House of Representatives. One of the witnesses at that hearing was the Honorable Alex Kozinski, the Ninth Circuit judge who authored *Hart v. Massanari, supra.*

In *Hart v. Massanari, supra,* Judge Kozinski noted that "[w]hile federal courts of appeals generally lack discretionary review authority, they use their authority to decide cases by unpublished -- and nonprecedential -- dispositions to achieve the same end." *Hart v. Massanari, supra* at 1177. Judge Kozinski (together, at times,[15] with Judge Stephen Reinhardt, the senior member of the Ninth Circuit panel that was *assigned,* but did not *decide,* the case at issue in this Petition) has emphasized the practical benefits (even the necessity) of unpublished (and nonprecedential) judicial opinions for the operation of the Ninth Circuit. *See, e.g., Hart v. Massanari, supra* at 1176-1178. Disabled Rights does not dispute the practical benefits (nor the necessity and constitutionality) of maintaining a distinction between precedent-setting cases and cases where a shorter, less time-consuming, and non-precedential disposition is appropriate.

Disabled Rights is persuaded by Judge Kozinski's arguments regarding the constitutionality and practicality of

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[14] A torrent of commentary followed in the wake of *Anastasoff v. United States,* 223 F.3d 898, *vacated as moot on reh'g en banc,* 235 F.3d 1054 (8th Cir. 2000).

[15] *See, e.g.,* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions,* CAL. LAW., June 2000.

nonpublication. Furthermore, Judge Kozinski is a man of extraordinary intellect, industry, and intellectual honesty. As such, he has articulated standards for publication of opinions as follows:

> Whether or not something is published is not up to the whim of the judges. We have legal standards for when we publish. One very simple way of testing it, if I have to write a disposition and I can't cite a Ninth Circuit case on point I publish, and I think that is a rule of most of my colleagues. It has to be a Ninth Circuit case directly controlling.

Unpublished Judicial Opinions: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 107th Cong., 2nd Sess. 62 (June 27, 2002) (testimony of Judge Alex Kozinski).

Unfortunately for the Disabled Rights Action Committee (and its members residing in Las Vegas), its appeals to the Ninth Circuit have repeatedly been heard by judges representing the minority of Ninth Circuit judges who do not subscribe to Judge Kozinski's responsible standards for publication. In fact, with the exception of *Long v. Coast Resorts, Inc.*, 267 F.3d 918 (9th Cir. 2001) (wherein Judge Kozinski was the senior member of the panel which heard *and decided* the case), the appeals of the Disabled Rights Action Committee (and its members) to the Ninth Circuit have repeatedly been given short shrift, even though each appeal was decided (*sub silentio*, of course) on a point of law that has been contrary to the precedent of *this* Court (let alone contrary to Ninth Circuit precedent).[16]

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[16] In *Mortenson v. Rock Springs Vista Development Corp.*, 8 Fed.Appx. 837 (9th Cir. 2001) *petition for cert. denied*, 122 S.Ct. 542 (2001), the Ninth Circuit declined to accord a disabled person "tester" standing

In sum, the practical effect of the Ninth Circuit's use of unpublished dispositions "to achieve the same end" as a grant of "discretionary review authority," is plainly evident in the case submitted for review. The panel of the Ninth Circuit, without discretionary review authority, has effectively decided not to decide the case presented to it for review. No matter what course of action is taken by the circuit courts of appeals vis-a-vis unpublished opinions, the course of action taken by the Ninth Circuit in this case presents a situation that simply cannot be remedied by modification of nonpublication rules because an "inconvenient *decision*" has not been buried. Instead, an "inconvenient *case*" has been buried.

The distinction between burying a decision and burying a case is that, where a case has been buried, there is no decision that addresses the case. The effect of burying the case that is the subject of this Petition can be objectively measured by the same method shown by Professor Arthur Hellman before Congress to demonstrate the precedential insignificance

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under 42 U.S.C. § 3604(f)(2) even though an administrative pronouncement of the Department of Housing and Urban Development stated that such standing *should* be accorded in light of *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Furthermore, the Ninth Circuit did not even address the logic of the administrative pronouncement as required under *United States v. Mead Corp.*, 533 U.S. 218 (2001) and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Disabled Rights Action Committee v. Fremont Street Experience Limited Liability Company*, 44 Fed.Appx. 100 (9th Cir. 2002), *petition for cert. filed* Oct. 21, 2002 (No. 02-625), the Ninth Circuit affirmed the district court's literal "disintegration" of a claim of discriminatory *conduct* into the discrete manifestations of the conduct, thus allowing a finding of mootness despite this Court's precedent (in *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000) and *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199 (1968)) requiring the party asserting mootness of conduct to show that it is absolutely clear that the wrongful behavior will not recur.

of unpublished decisions:

> But I have here – this is the Federal appendix we have heard so much about. These are the unpublished opinions – not the hard-covered version but the soft-covered version. If you were to browse through that, you would say that most of those cases got just about the treatment they deserve, a written opinion, but not precedential.

Unpublished Judicial Opinions: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 107th Cong., 2nd Sess. 64 (June 27, 2002) (testimony of Professor Arthur Hellman).

Apart from parties to the case, no one reading the Ninth Circuit's Memorandum disposition of this case would have the slightest idea of the error that the Ninth Circuit committed in avoiding its duty to hear and decide the case presented to it for review. The uninformed reader would simply conclude that Disabled Rights had tried to make a state law claim for "unjust enrichment" without ample facts for the cause of action – end of story.

To the informed, however, the Ninth Circuit's Memorandum disposition in this case is an example of a circuit court evading its duty to decide the case presented for review. As this Court has recently reiterated, "'[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that *the purpose of pleading is to facilitate a proper decision on the merits.*'" *Swierkiewicz v. Sorema* N.A., 534 U.S. at 514 (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957) (emphasis added)). Furthermore, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so

as to grant the necessary relief." *Bell v. Hood*, 327 U.S. at 684. The Ninth Circuit, however, has done just the opposite: it has been alert to adjust the *complaint* so as to preclude review of a decision, to avoid its duty to decide the case submitted for review, and to effectively deny *any* relief for an invasion of federally protected rights.

The United States Supreme Court retains the ultimate check on the practices of the circuit courts of appeals. That check is this Court's supervisory power, and that power should be exercised in this case.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed March 20, 2002]

DISABLED RIGHTS ACTION COMMITTEE; RONALD RAY SMITH,	)	No. 01-15248
Plaintiffs-Appellants,	)	D.C. No. CV-00-00806-RLH
v.	)	
SANTA FE GAMING CORPORATION,	)	**MEMORANDUM***
Defendant-Appellee.	)	

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, District Judge, Presiding

Argued and Submitted, February 12, 2002
San Francisco, California

Before: REINHARDT and FISHER, Circuit Judges, and MOLLOY, District Judge.**

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** The Honorable Donald Molloy, United States

District Judge for the District of Montana, sitting by designation.

Plaintiffs brought this action pursuant to Title III of the Americans With Disabilities Act ("ADA"), seeking an accounting for unjust enrichment because one of the shuttle buses that defendant Santa Fe Gaming ("Santa Fe") operated was not accessible to patrons who use wheelchairs. The district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6), and plaintiffs appeal.

The district court ruled that the remedial provision of Title III of the ADA, 42 U.S.C. § 12188, does not allow an equitable remedy in monetary form, such as an accounting for unjust enrichment.[1] We agree that the relief sought here is not authorized, given the circumstances of this case, and need not decide any broader question.

Plaintiffs have not stated a cognizable claim for unjust enrichment. They do not allege that defendant Santa Fe gained profits from its alleged ADA violation that properly belonged to the plaintiffs. See, *e.g.*, *Oregon Laborers-Employees Health & Welfare Trust Fund v. Philip Morris*, 185 F.3d 957, 968 (9th Cir. 1999) (stating that "to state a cause of action for unjust enrichment, plaintiffs must show that they conferred a 'benefit' on defendants and that it would be unjust for defendants to retain that benefit"). Here, plaintiffs were able to ride other Santa Fe buses during the time that the defendant's larger and non-conforming bus was in service. Under the circumstances, by seeking an accounting for unjust enrichment when Santa Fe did not reap profits that rightfully belonged to the plaintiffs, the plaintiffs are in

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[1] Title III of the ADA, which proscribes discrimination in public accommodations, incorporates the remedies contained in the public accommodations portions of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a).

essence pursuing punitive damages for defendant's alleged ADA violation. Damages are not an available remedy for a violation of Title III of the ADA. See 42 U.S.C. § 2000a-3(a). Thus, the district court properly dismissed plaintiffs' claim as a matter of law.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Entered and Served December 15, 2000]

DISABLED RIGHTS ACTION COMMITTEE; a Utah nonprofit corporation; and RONALD RAY SMITH,	)	
Plaintiffs,	)	CV-S-00-00806 RLH
vs.	)	
SANTA FE GAMING CORPORATION, a Nevada corporation, et al.,	)	ORDER (Motion to Dismiss– # 4)
Defendant-Appellee.	)	

This matter came before the Court on Defendant Santa Fe's Motion to Dismiss Cause of Action for Unjust Enrichment (# 4). The Court has considered Defendant's Motion (# 4), Plaintiff's Opposition (# 6), and Defendant's Reply (# 7).

BACKGROUND

This is an action based upon an alleged violation of Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, because the Santa Fe Gaming Corporation ("Santa Fe") operated a shuttle bus that was not wheelchair

accessible. The Second Cause of Action, which is the subject of the instant motion, seeks an accounting for unjust enrichment. The Plaintiffs assert that employment of a shuttle bus system confers an economic benefit to the Santa Fe and Santa Fe's delay in retrofitting the shuttle bus gives them the associated time value of money.

DISCUSSION

The Santa Fe contends that the Plaintiffs have failed to state a claim upon which relief can be granted in the second cause of action for unjust enrichment. The Santa Fe believes that an accounting for unjust enrichment is a form of monetary relief, which is unavailable under Title III of the ADA. Plaintiffs argue that accounting for unjust enrichment constitutes "preventive relief" allowable under Title III of the ADA.

I. Motion to Dismiss

In considering Defendants' Motion to Dismiss, the factual allegations of Plaintiffs' Complaint must be presumed to be true, and this Court must draw all reasonable inferences in favor of Plaintiffs. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). The issue is not whether Plaintiffs will ultimately prevail, but whether they are entitled to offer evidence in support of their claims. *Scheuer v. Rhodes*, 416 U.S. 232, (1974). Consequently, the Court may not grant a Motion to Dismiss for failure to state a claim "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Court does not, however, necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in Plaintiffs' Complaint. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031, (1981).

II. Accounting for Profits as Unjust Enrichment

Plaintiffs have alleged a cause of action seeking an accounting for unjust enrichment. Title III of the ADA deals with public accommodations and services operated by private entities. 42 U.S.C. § 12188 discusses the enforcement of violations of the ADA. Specifically, 12188(a)(1) states:

> The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title.

42 U.S.C. § 2000a-3(a) allows aggrieved persons in a civil action to seek "...preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, [which] may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance."

In the instant case, Plaintiffs seek an accounting for unjust enrichment, which includes the "application of the principles of equity [requiring] Defendants to disgorge to Plaintiffs the full amount of economic gain reaped by Defendants through [their] illegal conduct." Although Plaintiffs have eloquently termed this an "accounting for profits", Santa Fe would have to pay or "disgorge" to Plaintiffs any economic gain it received during this period. This in essence makes the "accounting for profits" a form of monetary relief. Under the ADA, Congress created a cause of action for private individuals, but limited the remedies

available under that cause of action to "preventative" or equitable relief. *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1120 (9th Cir. 2000). Monetary relief is not an option for private individuals under Title III of the ADA...as a result, a plaintiff who files an ADA claim can at most hope to improve access through an injunction. *Id.* So, at best, Plaintiffs in this case can hope to improve access to the shuttle bus through an injunction and nothing more. Therefore, the Court agrees that Plaintiffs Second Cause of Action has failed to state a claim upon which relief can be granted, because the ADA does not allow awards for monetary relief.

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (# 4) is GRANTED.

Dated December 12, 2000.

/s/ ROGER L. HUNT

United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed August 8, 2002]

DISABLED RIGHTS ACTION COMMITTEE; RONALD RAY SMITH,	)	No. 01-15248
Plaintiffs-Appellants,	)	D.C. No. CV-00-00806-RLH District of Nevada,
v.	)	Las Vegas
SANTA FE GAMING CORPORATION,	)	**ORDER**
Defendant-Appellee.	)	

Before: REINHARDT and FISHER, Circuit Judges, and MOLLOY, District Judge.*

The panel has unanimously voted to deny the Petition for Rehearing. Judge Reinhardt and Judge Fisher vote to deny the Petition for Rehearing En Banc, and Judge Molloy so recommends.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35.

The Petition for Rehearing and Petition for Rehearing En Banc are DENIED.

* The Honorable Donald Molloy, United States District Judge for the District of Montana, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed June 19, 2000]

DISABLED RIGHTS ACTION COMMITTEE; a Utah nonprofit corporation; and RONALD RAY SMITH,	)	
Plaintiffs,	)	CV-S-00-00806 RLH
vs.	)	
SANTA FE GAMING CORPORATION, a Nevada corporation, DOES I-X; and ROE CORPORATIONS I-X; et al.,	)	**COMPLAINT**
Defendant-Appellee.	)	

Plaintiffs, DISABLED RIGHTS ACTION COMMITTEE, a Utah nonprofit corporation; and RONALD RAY SMITH, by and through their attorney, RICHARD F. ARMKNECHT, III, do hereby complain against SANTA FE GAMING CORPORATION, a Nevada corporation, DOES I-X; and ROE CORPORATIONS I-X; as follows:

JURISDICTION AND VENUE

1. This is an action for declaratory judgment and permanent injunctive relief for Defendants' violations of Title III of the Americans with Disabilities Act, 42 U.S.C. §

12181, *et seq.* (ADA), and for equitable relief in the form of an accounting for Defendants' unjust enrichment. Plaintiff SMITH files this action individually, and Plaintiff DISABLED RIGHTS ACTION COMMITTEE files this action on behalf of its members. The Court has jurisdiction of this action under 28 U.S.C. § 1331, and 42 U.S.C. § 12188(a)(1).

2. Venue of this action is appropriate in the United States District Court for the District of Nevada, pursuant to 28 U.S.C. § 1391(b) and (c) as the claim arose in such district and, further, as Defendants conduct business in such district.

THE PARTIES

3. Plaintiff RONALD RAY SMITH is a natural person who resides in Las Vegas, Nevada. Mr. Smith requires a wheelchair for mobility. He desires the fullest access (on a non-discriminatory and fully integrated basis) to all of the amenities of living in Las Vegas, including the bus service provided by Defendants. Such desire is frustrated by the maintenance of public accommodations (including the bus service provided by Defendants) which subject Plaintiff SMITH to discrimination and segregation.

4. Plaintiff DISABLED RIGHTS ACTION COMMITTEE (DRAC) is a Utah non profit corporation organized with the principal purpose of helping to eliminate discrimination against individuals with disabilities by ensuring compliance with laws intended to provide access to housing, public buildings, transportation, goods and services. The ADA constitutes such a law. DRAC is qualified as a charitable organization under 26 U.S.C. § 501(c)(3). Members of DRAC are primarily individuals with disabilities and persons related to individuals with disabilities. DRAC has over one thousand members nationwide. DRAC's membership includes residents of Nevada other than the individual plaintiff. As a result of their disabilities, certain accommodations are necessary to

allow DRAC's members access to public buildings, transportation, goods and services, which access is required under the ADA.

5. Defendant SANTA FE GAMING CORPORATION ("SANTA FE") is a Nevada corporation primarily engaged in the hotel and gaming business. SANTA FE's hotel and gaming property is the "Santa Fe Hotel & Casino" located at 4949 North Rancho Drive, Las Vegas, Nevada. As an amenity associated with its principal business (hotel and gaming), SANTA FE provides a shuttle bus service. SANTA FE is subject to the requirements of the ADA as it operates or otherwise provides (either directly or indirectly) public accommodations, as defined in Title III of the ADA, 42 U.S.C. § 12181.

6. DOES I-X are fictitiously-named individuals who are employed or otherwise affiliated with the named Defendant which operate and provide discriminatory shuttle bus service at the Santa Fe Hotel & Casino, or who otherwise have sufficient control over the equipment and/or operations of the shuttle bus system in order to cause a remedy to the discriminatory aspects of the shuttle bus system complained of. Such fictitiously-named individuals are anticipated to be identified through discovery at which time the fictitiously-named Defendants can be identified in true name.

7. ROE CORPORATIONS I-X are fictitiously-named corporations or other business entities that are affiliated with the named Defendants (either contractually, as subsidiaries, or as commonly-owned entities) which operate and provide discriminatory shuttle bus service at the Santa Fe Hotel & Casino, or which otherwise have sufficient control over the equipment and/or operations of the shuttle bus system in order to cause a remedy to the discriminatory aspects of the shuttle bus system complained of. Such fictitiously-named corporations are anticipated to be identified through discovery at which time the

fictitiously-named Defendants can be identified in true name.

FIRST CAUSE OF ACTION

(Violation of ADA)

8. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 7 hereof, and incorporate the same herein by reference.

9. Plaintiffs, because of their disabilities, cannot fully and equally access the transportation services provided by Defendants. Plaintiff SMITH was subjected to such discrimination on Sunday, June 10th, 2000, when Mr. SMITH visited the Santa Fe and waited at the shuttle bus stop for a ride. At 7:15, p.m., a large shuttle bus bearing license plate 448 DYX (448 DYX) arrived. See Exhibit 1. 448 DYX was not equipped with a wheelchair lift, so Mr. SMITH was discouraged from even attempting to board the bus, as such effort would have constituted a futile gesture.

10. For all Plaintiffs (including wheelchair-using members of Plaintiff DRAC, whom DRAC is representing in this cause of action) the inability to access Defendants' shuttle bus, 448 DYX, is ongoing and constitutes irreparable harm in the nature of humiliation, limitation of freedom, and in other forms of intangible injuries to Plaintiffs' dignity interests. Plaintiffs eagerly await the opportunity to access Defendants' transportation on a nondiscriminatory basis or, in the alternative, to see the cessation of the discriminatory practices conducted by Defendants by their favoring able-bodied patrons in the provision of shuttle transportation.

11. 448 DYX can carry more than 16 persons (including the driver), has (on information and belief) been acquired subsequent to 1990, and runs on a fixed route.

12. Defendants have discriminated against Plaintiffs on the basis of disability in the full and equal enjoyment of the services, facilities, privileges, advantages, or accommodations of Defendants' place of public

accommodation.

SECOND CAUSE OF ACTION

(Accounting for Unjust Enrichment)

13. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 12 hereof, and incorporate the same herein by reference.

14. On information and belief, Defendants' employment of a shuttle bus system confers an economic benefit to Defendants, and Defendants' delay in retrofitting 448 DYX gives Defendants the associated time value of money.

15. The ADA has been the "law of the land" since 1990, and knowledge of the law (and the benefits it confers upon disabled persons) may be imputed to Defendants. Furthermore, as of the date of service of this Complaint, Defendants have *actual* notice of their obligations under the ADA.

16. As Defendants have infringed upon the rights of others (wheelchair users residing in or visiting Las Vegas) to gain an economic benefit (the economic advantage of leasing less expensive, inaccessible, vehicles; the increased profitability inherent in operating a shuttle bus service; and the time value of money), Defendants have been unjustly enriched, and the full application of the principles of equity requires Defendants to disgorge to Plaintiffs the full amount of economic gain reaped by Defendants through Defendants' illegal conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered against Defendants;

(a) For a permanent injunction enjoining Defendants, their agents, employees and assigns from discrimination on the basis of disability in violation of the Americans with Disabilities Act, 42 U.S.C. § 12181, *et seq.*,

and specifically requiring Defendants to cease violating 42 U.S.C. § 12182(b)(2)(B) by operating on a fixed route any inaccessible shuttle bus seating more than 16 persons (and in all events providing equivalent bus service to persons without regard to disability);

(b) For the full amount of the economic benefit which has wrongfully inured to Defendants as a result of their violation of the ADA;

(c) For Plaintiffs' attorney's fee, including litigation expenses, and costs of suit; and

(d) For such other and further relief deemed appropriate by the Court.

DATED this 17th day of June, 2000.

/s/

Richard F. Armknecht, III, Esq.,
Nevada Bar Number 5205
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APPENDIX E

TEXT OF APPELLANTS' REPLY BRIEF IN THE NINTH CIRCUIT

I. Introduction.

The United States Supreme Court has recently noted that "one of the [Americans with Disabilities] Act's 'most impressive strengths' has been identified as its 'comprehensive character'" *PGA Tour, Inc. v. Martin*, 532 U.S. ___, ___; No. 00-24, slip op. at 12 (decided May 29, 2001) (*quoting* Hearings on S. 933 before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped, 101st Cong., 1st Sess., 197(1989)(statement of Attorney General Thornburgh)). Santa Fe Gaming Corporation (Santa Fe), in urging the Court to adopt a restrictive reading of the enforcement scheme of Title III of the Americans with Disabilities Act of 1990 (ADA), characterizes Plaintiffs' brief as "nothing more than a lengthy argument of the law as they would like it to be rather than the law as it exists." Appellee Brief, p.6. While it is true that there is "no ADA case law directly holding that a claim for unjust enrichment or other monetary relief can be awarded under [Title III of] the ADA." (Appellee Brief, p.6), there is also no ADA case law that directly addresses the availability of disgorgement of unjust enrichment or other forms of *equitable* monetary relief. Clearly, the Court is presented with a case of first impression and "The fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *PGA Tour, Inc. v. Martin*, 532 U.S. ___, ___; No. 00-24, slip op. at 27 (decided May 29, 2001), quoting *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998).

Aside from various examples of *dicta*, Santa Fe's restrictive reading of the enforcement scheme of Title III of

the ADA has no basis in existing case law, in the plain meaning of 42 U.S.C. 12188(a)(1), in the plain meaning of 42 U.S.C. 2000a-3(a), in the purpose of the ADA, or in the enforcement of ADA Title III.[1]

II. This Court is not Required to Engage in Fact-Finding.

Santa Fe certainly understands that this is an appeal of a dismissal under Fed. R.Civ.Pro. 12(b)(6). Appellee Brief, p. 1. Accordingly, the allegations of the Complaint are taken as true. Santa Fe, however, contends that no "compelling need" for monetary equitable relief has been "demonstrated" and that "Appellants have produced no evidence that violators are dragging their feet in settling Title III access cases." Appellee Brief, pp. 21-22. At this stage of the proceedings, of course, Plaintiffs have not assembled the evidence (or, at least, have not submitted all of their evidence to the district court) to support an award in equity of monetary relief. Santa Fe is essentially attempting to turn this appeal into an appeal of a grant of *summary judgment* in favor of Santa Fe. Plaintiffs had the misfortune to have their claim dismissed under Fed.R. Civ. Pro. 12(b)(6). If their case had survived the 12(b)(6) motion, *then* they would have entered into evidence facts sufficient to support the equitable relief sought. This evidentiary incapacity is remedied by the standard of review applicable

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[1] It is also important to note what Santa Fe Gaming Corporation (Santa Fe) has *not* argued in its "Appellee Brief." It has not argued that the word "including" should be deemed to be a term of limitation. It has not argued that an accounting for profits would not serve a "preventive" function (but, instead, argues that "[t]he terms 'preventive' or 'preventive relief' as used in 42 U.S.C. 2000a-3(a) refer only to those *injunctive remedies* such as injunctions, restraining orders and other such orders.") Appellee Brief, p.16. (emphasis in original). It also does not argue that an accounting for profits (or disgorgement) is anything other than an equitable remedy

to motions to dismiss under 12(b)(6). Questions of fact and matters of equity, of course, are properly matters for the district court to decide, and this Court should decline Santa Fe's invitation to engage in both fact finding and equity-weighing at the appellate level. *See, Murray v. United States*, 487 U.S. 533, 542-43 (1988).

III. Santa Fe's Case Law "Support" is Mere *Dicta.*

Santa Fe cites a host of cases for the proposition that 42 U.S.C. 2000a-3(a) does not provide for *damages. See, e.g., Newman v. Piggie Park*, 390 U.S. 400, 402 (1968); *Fischer v. SJB-P.D. Inc.*, 215 F.3d 1115, 1120 (9th Cir. 2000); *American Bus Association v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000); *Stan v. WalMart Stores, Inc.*, 111 F.Supp.2d 119, 124 (N.D.N.Y. 2000); *Long v. Coast Resorts, Inc.*, 32 F.Supp.2d 1203, 1209 (D.Nev. 1998); *A.R. v. Kogan*, 964 F.Supp. 269, 271 (N.D.Ill. 1997); *Battle v. Dayton-Hudson Corporation*, 399 F.Supp. 900, 905 (D.Minn. 1975); *Lyle v. Village of Golden Valley*, 310 F.Supp. 852, 854-855 (D.Minn. 1970). This point of law is clear, and Plaintiffs *agree* that no damages are allowed under 42 U.S.C. 2000a-3(a). Many of the cases cited by Santa Fe state that district courts' jurisdiction under 42 U.S.C. 2000a-3(a) is limited to "injunctive relief." See, *A.R. v. Kogan*, 964 F.Supp. 269, 271 (N.D.Ill. 1997); *Battle v. Dayton-Hudson Corporation*, 399 F.Supp. 900, 905 (D.Minn. 1975); *Lyle v. Village of Golden Valley*, 310 F.Supp. 852, 854-855 (D.Minn. 1970). These pronouncements are, however, completely consonant with allowing monetary *equitable* relief under a well-established point of law: monetary equitable relief is "ancillary to" or "incident to" injunctive relief. *See, infra* at 13-18.

Still fewer of the cases cited by Santa Fe contain language supporting Santa Fe's proposition that 42 U.S.C. 2000a-3(a) does not provide for "monetary relief." *See, e.g., Fischer v. SJB-P.D. Inc.*, 215 F.3d 1115, 1120 (9th Cir. 2000); *Stan v. WalMart Stores, Inc.*, 111 F.Supp.2d 119, 124

(N.D.N.Y. 2000). *See also, American Bus Association v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000) (noting an "intent to deny *agencies* the power to authorize supplementary injunctive relief."(emphasis added)). In two of the cases cited by Santa Fe (*Stan v. WalMart Stores, Inc.*, and *American Bus Association v. Slater*), the "monetary relief" that was actually sought in the case was limited to damages. In *Fischer v. SJB-P.D. Inc.*, the connection was even more tenuous: no relief other than attorneys fees was at issue. Clearly, because neither restitution, disgorgement, nor an accounting for profits was at issue, language denying *any* "monetary relief" (including monetary relief other than damages) is merely *dicta*. *Cf., Allegeheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (*stare decisis* extends to holdings of prior cases and "to their explications of the governing rules of law") (Kennedy, J., concurring and dissenting).

The Court's overreach in its *dicta* is certainly understandable. It is "the 'general rule' that monetary relief is legal" *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998) (quoting *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990)). *See also, Curtis v. Loether*, 415 U.S. 189, 196 (1974). Furthermore, only the availability of attorneys fees was before the Ninth Circuit in *Fischer v. SJB-P.D. Inc., supra*, not the question presented in this case: what is the scope of the relief afforded under 42 U.S.C. 2000a-3(a)?

IV. 42 U.S.C. 12188(a)(1) Does Not Preclude *Equitable Forms* of Monetary Relief.

Santa Fe contends that "the determinative factor in this appeal is that Title III of the ADA, section 12188 provides for two remedies . . . the private civil action [and] enforcement by the Attorney General." Appellee Brief, p. 19. Santa Fe argues that (1) there is a large body of case law

which holds that "12188(a)(1) of the ADA is limited to providing injunctive relief and not monetary relief" and (2) "the provision of 42 U.S.C. § 12188(b) provides enforcement by the Attorney General including assessment of monetary damages and civil penalties. Plaintiff Smith chose to bring his suit under the private enforcement provision of Title III of the ADA rather than seeking relief under 12188(b)." Appellee Brief, p. 9.

42 U.S.C. 12188(a)(1), of course, expressly incorporates the remedies afforded under 42 U.S.C. 2000a-3(a), and references to 42 U.S.C. 12188(b) are simply inapplicable to this case. First of all, Santa Fe is in error to assert that Plaintiffs had a *choice* of bringing suit under either 12188(a)(1) or 12188(b). The choice -- under the statutory scheme - is the choice of the Attorney General, not that of the Plaintiffs. Furthermore, under the realities of civil rights litigation, the Department of Justice is simply unable to enter into every civil rights lawsuit. Next, just because the Attorney General has a set of remedies that is more expansive than that available to private litigants is no basis for concluding that private litigants should be denied the full range of equitable remedies which are ancillary to (or "adjunct to" or "incident to") injunctive relief.

Santa Fe misreads *American Bus Association v. Slater*, 231 F.3d 1 (D.C. Cir. 2000). The circuit court in that case was not "faced with interpreting the scope of § 2000a-3(a) remedies." (Appellee Brief, p.17) except for the readily-accepted point that *damages* are not available. To the extent that *American Bus Association v. Slater* makes the point that only specifically enumerated remedies are available under the ADA, such holding merely states the truism that remedies under 42 U.S.C. 12188(a)(1) are limited to the remedies available under 42 U.S.C. 2000a-3(a) and that 42 U.S.C. 2000a-3(a) does not provide for damages.

Santa Fe apparently argues that, because "the Congress carefully crafted the ADA remedies scheme and

evinced its intent that damages would be available under 42 U.S.C. 12188(b) only if certain conditions were met," (Appellee Brief, pp. 13-14) the full range of equitable relief should not be available under 42 U.S.C. 2000a-3(a) (as incorporated under 42 U.S.C. 12188(a)(1)). Of course, Santa Fe seeks to mix apples (private lawsuits) with oranges (Attorney General lawsuits). There is simply nothing to support the contention that a limitation of *damages* to Attorney General lawsuits indicates that the full range of *equitable remedies* should not be available to private litigants. In fact, the opposite is indicated because where damages are not available to private litigants, "necessary relief" must include something in addition to injunctions *other than* damages. As the Supreme Court has observed: "If [persons obliged to comply with civil rights laws] faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality [and] . . . 'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

Furthermore, even the most comprehensive of enforcement schemes (such as the enforcement scheme set forth under ERISA[2]) does not "crowd out" the full range of equitable remedies (including restitution) without a clear expression of Congressional intent. *See, Mertens v. Hewitt Assocs.* 508 U.S. 248, 256-258 (1993). *Cf., Dishman v. UNUM Life Insurance Company*, Nos. 99-55963 and 99-56077, slip op. at 5747-48 (9th Cir. May 8, 2001) (prejudgment interest allowable in an ERISA claim); *Shaw v. International Ass'n of*

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[2] Six statutory enforcement provisions provide evidence that Congress did not intend any other means of enforcement. See, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

Machinists & Aerospace Workers Pension Plan, 750 F.2d 1458, 1465 (9th Cir. 1985) (same).

Santa Fe attempts to distinguish *United States v. Rent-a-Homes Systems of Illinois, Inc.*, 602 F.2d 795 (7th Cir. 1979); *United States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978); and *United States v. Long*, 537 F.2d 1151 (4th Cir. 1975) *cert. denied* 429 U.S. 871 (1976) based upon the fact that each of those cases was "brought by the Attorney General as opposed to private civil actions." Appellee Brief, p. 18. Again, Santa Fe sees a variety of remedies in a statutory scheme and concludes that, even though an identical statutory provision is found in two different enforcement schemes, each having a different mix of provisions, that an earlier description of the discreet and identical provision is distinguishable.[3] The enforcement at issue is not intertwined with the enforcement available to the Attorney General under 42 U.S.C. 12188(b) and "each kind of relief is separably authorized in a separate and distinct statutory provision." *Tull v. United States*, 481 U.S. 412, 424 (1987) (describing the enforcement scheme for the Clean Water Act). Finally, the implication that an enforcement provision should have a narrower scope for private litigants than for the Attorney General runs directly against the *purpose* of private enforcement through 42 U.S.C. 2000a-3(a), which section incorporates the efforts of private attorneys general for "vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park*, 390 U.S. 400, 402 (1968).

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[3] Instead of "not being able to see the forest for the trees," Santa Fe has focused on the "forest" to describe a "tree" and presents logic which is analogous to the following syllogism: "Oaks located in a forest consisting of oak, maple and beech are observed to bear acorns in the fall. This oak is found in a forest consisting of oak and pine. Therefore, this oak will not bear acorns."

V. 42 U.S.C. 2000a-3(a) does not Restrict Equitable Jurisdiction.

A. Santa Fe has not presented a clear and valid legislative command negating any equitable relief.

Santa Fe (at Appellee Brief, pp. 19-20) is plainly aware that a limitation on the "comprehensiveness" of a district court's "equitable jurisdiction is not to be denied or limited in the absence of *a clear and valid legislative command.* Unless a statute in so many words, or by necessary inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (emphasis added). The Ninth Circuit has noted that "Congress's intent to adopt such a regime must be clear: a strong presumption militates against any such finding." *Reebok Int'l, Ltd. v. Marnatech Enter., Inc.*, 970 F.2d 552, 561 (9th Cir. 1992).

Santa Fe seeks to convince the Court that a "clear and valid legislative command" is found in the *heading* to the statutory provision at issue ("Civil actions for injunctive relief") and to its *description* (in the legislative history) as a "bill . . . to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations." Appellee Brief, pp. 10-11 (quoting *Lyle v. Village of Golden Valley*, 310 F.Supp. 852, 854-855 (D.Minn. 1970)). Certainly, "'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez - Torres v. United States*, 523 U.S. 224, 234 (1998), quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-529 (1947). Santa Fe, however, fails to provide an example of a *heading* to a statutory provision which has provided a "clear and valid legislative command" to limit equitable remedies where the statute provides for injunctive relief. In fact, Santa Fe does not provide *any* example of a

court-recognized "clear and valid legislative command" sufficient to countermand the presumption of broad equitable remedies (including equitable monetary relief) where injunctive relief is authorized by Congress.[4]

When held up to the standard enunciated by the Supreme Court for a "clear statement" in legislation, the headings presented by Santa Fe appear particularly anemic. For example, in *Landgraf v. USI Film Products*, 511 U.S. 244, 260 (1994), the language that the Supreme Court suggested might qualify as a clear statement (that a statute was to apply retroactively)was: "[T]he new provisions shall apply to all proceedings pending on or commenced after the date of enactment." *See also, Martin v. Hadix*, 527 U.S. 343, 353-355 (1998). In *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960), the Supreme Court considered a grant of jurisdiction "to restrain violations" limited so "that no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action." The Supreme Court held that there was "no warrant for construing the [limiting] proviso as reaching beyond suits to enjoin violations of the minimum wage and overtime provisions of the statute, so as wholly to eradicate any jurisdiction to restore wage losses to employees discharged in [retaliation for maintaining their rights under law]." *Id.* at 296. *See also, Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. ___, ___ ; No. 00-763, slip op. at 10 (decided June 4, 2001)(Court will not create limitation on remedy for civil rights violation where such limitation has

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[4] Of course, Congress can restrict the district courts equity jurisdiction, and has chosen to do so in a variety of contexts. See, *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 303, 342 (1999) (GINSBURG, J., dissenting), citing *Yakus v. United States*, 321 U.S. 414, 442, n.8 (1944).

not been drawn by Congress.). Neither the statute nor the relevant legislative history in this case presents anything that even comes close to the degree of clarity that is required by the Supreme Court.

B. Ancillary remedies are at issue in this case.

Santa Fe's brief repeatedly argues that the "preventive relief" allowed under 42 U.S.C. 2000a-3(a) is limited to "those *injunctive remedies* such as injunctions, re[s]training orders and other such orders." Appellee Brief, p. 16. This argument is conclusory and sidesteps the question before the Court: is ancillary equitable relief allowed under 42 U.S.C. 2000a-3(a)? Santa Fe contends that a statute's provision of injunctive relief (with no other *enumerated* relief) precludes the district courts from access to the full range of their traditional equitable jurisdiction. The Supreme Court, however, has made it clear that the *other* types of equitable remedies (unless plainly restricted from the district courts' jurisdiction by Congress) are "ancillary to" injunctions, "adjunct to" injunctions, or "incident to" injunctions. *See, Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990)("a monetary award 'incidental to or intertwined with injunctive relief' may be equitable."(quoting *Tull v. United States*, 481 U.S. 412, 424 (1987))). This point of law has been repeatedly recognized by both the United States Supreme Court and the circuit courts in a broad array of statutory schemes:

1. Intellectual Property. "Prior to the Copyright Act of 1909, there had been no statutory provision for the recovery of profits, but that recovery had been allowed in equity both in copyright and patent cases as appropriate equitable relief *incident to* a decree for an injunction." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940) (citing, *Stevens v. Gladding, et al.* 17 How. 447, 455 (1854)).

2. Price Controls. In the context of emergency price control regulation, the Supreme Court has stated that:

> "a decree compelling one to disgorge profits acquired in violation of the Emergency Price Control Act may properly be entered by a District Court once its equity jurisdiction has been invoked. * * *.
> An order for the recovery and restitution of illegal rents may be considered a proper "other order" under either of two theories:
> (1) It may be considered as an equitable *adjunct to an injunction decree* * * *.
> (2) It may be considered as an order appropriate and necessary to enforce compliance with the Act."

Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (emphasis added).

3. Securities Laws. 15 U.S.C. 78u(d)(1) (which is described in the heading of 15 U.S.C. 78u(d) as "Injunction proceedings") proscribes insider trading with the enforcement mechanism of "an action in the proper district court . . . and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond." No mention of any ancillary or included remedy to injunctive relief is made *explicit* in the statute, but the Ninth Circuit has noted that "The power of a district court to impose a receivership or to grant other forms of *ancillary relief* does not in the first instance depend on a statutory grant of power from the securities laws. Rather, the authority derives from the inherent power of a court of equity to fashion effective relief." *S.E.C. v. Wenke*, 622 F.2d 1363, 1369 (9th Cir. 1980)(emphasis added) (Citations omitted). The ancillary relief has included orders for disgorgement. *See, e.g., S.E.C. v. First Pacific Bancorp*, 142 F.3d 1186, 1191-1193 (9th Cir. 1998); *S.E.C. v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984).

4. Fair Trade Laws. 15 U.S.C. 53(b), is headed "Temporary restraining orders; preliminary injunctions,"

and mentions only injunctions (preliminary and permanent) and temporary restraining orders as remedies: there is no provision for "other orders." Concerning 15 U.S.C. 53(b), this Court has, however, noted that "the power to enjoin is part of what used to be the jurisdiction of equity" and has held that "Congress, when it gave the district court authority to grant a permanent injunction against violations . . . also gave the district court authority to grant any *ancillary relief* necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference." *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112-1113 (9th Cir. 1982)(emphasis added)); *see also Reebok Int'l, Ltd. v. Marnatech Enter., Inc.*, 970 F.2d 552, 560 (9th Cir. 1992). In *FTC v. Pantron I Corporation*, 33 F.3d 1088, 1102 (9th Cir. 1994), the Ninth Circuit held that "monetary equitable relief" (in the form of restitution or disgorgement of profits) was appropriate ancillary relief under 15 U.S.C. 53(b).

5. Food and Drug Regulation. 21 U.S.C. 332 is headed "Injunction proceedings" and it grants jurisdiction to the district courts for injunctions and restraining orders. No other form of relief is mentioned. Still, the Sixth Circuit held that it was "not established that the FDCA by 'a necessary and inescapable inference, restricts the court's jurisdiction in equity.' Nothing in the FDCA explicitly precludes a district court from ordering restitution." *United States v. Universal Management Services, Inc.*, 191 F.3d 750, 762 (6th Cir. 1999).[5]

In light of the foregoing examples, it is clear that the mere fact that a heading only mentions "injunctions" or

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[5] The Sixth Circuit's decision was so thorough that it distinguished (as superceded by *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960)) a Ninth Circuit case (*United States v. Parkinson*, 240 F.2d 918 (9th Cir. 1956)) that has never been cited by the Ninth Circuit in a published case.

"injunctive relief" is not at all indicative of a legislative intent to limit the full range of equitable relief. If Santa Fe were correct, then the Supreme Court and the Ninth Circuit has repeatedly been wrong, in consistently recognizing the availability of equitable "monetary relief" (whether in the form of an accounting for profits or in another form of restitution) in cases involving statutes enforceable only by injunctions *by their express terms.* This availability of additional equitable remedies is not surprising: restitution, accounting for profits, and disgorgement are part and parcel to "injunctive relief." Thus, these other remedies *complement* injunctive relief just as back pay under Title VII is not legal "damages" but is "an integral part of the equitable remedy of reinstatement" (*see, Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975))). Similarly, disgorgement is an integral part of the remedy of injunction.

VI. The Enforcement of Title III of the ADA Will Benefit with the Use of the Disgorgement Remedy.

Santa Fe understands that "the goal in 42 U.S.C. § 12188(a)(1) is to allow quick access by disabled individuals to public accommodations by the use of a wide range of injunctive remedies." Appellee Brief, pp. 20-21. Santa Fe, however, questions whether recognition of the availability of claims for unjust enrichment would be beneficial to the enforcement of Title III of the ADA in this case. Appellee Brief, p.22. The benefit is clear upon considering and understanding the nature of Title III of the ADA, the purpose of Title III of the ADA, the importance of private attorneys general in enforcement, and the nature and benefit of the disgorgement remedy.

A. The nature of ADA Title III

Title III of the ADA is in the nature of a public nuisance law, which at common law was "an act or omission 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects.'" *Tull v. United States*, 481 U.S. 412, 420 (1987)(citations omitted). With regard to the Clean Water Act, the Supreme Court has noted that "The objective of this statute is in some respects similar to that sought in nuisance suits, where courts have fully exercised their equitable discretion and ingenuity in ordering remedies. *E.g. Spur Industries, Inc. v. Del E. Webb Development Co.*, 108 Ariz. 178, 494 P.2d 700 (1972); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870 (1970)." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314, fn. 7 (1982). Clearly, district courts should be permitted to exercise similar equitable discretion and ingenuity in ordering remedies to violations of Title III of the ADA.

B. The purpose of the ADA.

Congress enacted the Americans with Disabilities Act of 1990 (ADA) for the following purposes:

> (1) to provide *a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities;*
>
> (2) to provide clear, strong, consistent, enforceable, standards addressing discrimination against individuals with disabilities;
>
> (3) *to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities;* and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. 12101(b). (Emphasis added.)

The congressional findings (*see*, 42 U.S.C. 12101), the purposes of the ADA and the enforcement scheme of Title III of the ADA make it plain that Congress sought to place discriminatory conduct affecting the disabled in the same category (and to afford the disabled the same powerful tools of enforcing laws prohibiting discrimination) as discrimination on the basis of race, color, sex, national origin, religion, or age.[6]

C. Enforcement through private attorneys general.

While Plaintiffs do not urge the Court to engage in fact-finding or equity-weighing (*see, supra* at 2-3), it may be noted that Santa Fe does not deny that, for over a month after the Complaint was filed, it continued to operate at least one of its buses in violation of the ADA -- and that the withdrawal of the bus from service was "due to mechanical problems" -- and not in an effort to comply with the ADA. Nor does Santa Fe deny that its course of conduct provided it with economic benefits. In fact, Santa Fe's notation that "injunctive relief was rendered moot" (Appellee Brief, p.22) underscores one of the economic benefits accruing to Santa Fe -- the avoidance of paying the Plaintiffs' attorneys fees in this case.

The avoidance of the payment of attorneys fees presents a sharp irony: the district court's opinion (and Santa Fe's brief) centered on *dicta* in this Court's decision of

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[6] *See also, Crawford v. Indiana Dept. of Corrections*, 115 F.3d 481, 486 (7th Cir. 1997) (The Americans with Disabilities Act was cast in terms not of subsidizing an interest group but of eliminating a form of discrimination that Congress considered unfair and even odious. The Act assimilates the disabled to groups that by reason of sex, age, race, religion, nationality, or ethnic origin are believed to be victims of discrimination.)

Fischer v. SJB-P.D. Inc., 215 F.3d 1115 (9th Cir. 2000) – a case which emphasized (and had as the only issue before it) the *availability* of attorneys fees. Furthermore, the Supreme Court has recently considered the possibility of defendants' "unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees" and dispelled that possibility as "only materializ[ing] in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Buckhannon Board & Care Home, Inc., v. West Virginia Dept. of Health and Human Resources*, 532 U.S. ___, ___; No. 99-1848, slip op. at 10 (Decided May 29, 2001). This "mooting an action before judgment", of course, is *precisely* what has happened in this case.

D. Disgorgement comports with the purpose of ADA Title III enforcement.

Santa Fe implies that it is *impossible under any set of facts* for a district court to order the sort of accounting for profits sought in this case. Appellee Brief, pp. 20-21. However, it is clear that the full breadth of equity jurisdiction is retained by the district courts under 42 U.S.C. 2000a-3(a). *See, supra*, at 13-18. It is also clear that the disgorgement of unjust enrichment is favored by the courts as the authority to order disgorgement derives from the broad equitable powers given courts under the securities laws "to provide such remedies as are necessary to make effective the congressional purpose." *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). Clearly, the congressional purpose of "the elimination of discrimination against individuals with disabilities" is aided when persistent violators of the ADA are required to disgorge profits associated with the continued violation.

A disgorgement remedy would serve a particularly useful role as preventive relief if applied in the United States District Court for the District of Nevada. Such usefulness is

evident upon a review of a denial of an injunction where Judge Hunt (the same judge whose decision is being appealed in *this* case) recognized that the defendants were in violation of Title III of the ADA, but wrongly applied the "barrier removal" standard[7] to "new construction."[8] *Long v. Coast Resorts, Inc.*, 32 F.Supp.2d 1203, 1212 (D.Nev. 1998). Thus, the district court was "loathe to grant injunctive relief." *Id.* Accordingly, the United Stated District Court for the District of Nevada has effectively licensed an ongoing violation of the ADA – in order to save the violator's money. Clearly, if disgorgement of the savings of the violator had been a remedy which was considered by the district court, the violator would have had a very strong financial incentive to comply with the ADA in a prompt manner. As it now stands in Nevada, violators of Title III of the ADA repeatedly appeal to the district court's equitable jurisdiction in order to avoid the plain terms of the ADA and its legislative regulations. If the full scope of the district courts' equitable jurisdiction is allowed to the district courts, then the district courts will not only be able to use their

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[7] Applicable to ADA Title III compliance at facilities existing *before* the effective date of the ADA and requiring only accessibility that is "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. 12181(9).

[8] Under 42 U.S.C. 12183, requirements for new construction are far more exacting than "readily achievable barrier removal," and covered entities must comply with the ADAAG, except in very limited circumstances that were specifically identified by Congress. 28 C.F.R. § 36.401. *See also Coalition of Montanans Concerned With Disabilities, Inc. v. Gallatin Airport Auth.*, 957 F. Supp. 1166, 1168 (D. Mont. 1997) ("The overall policy of the ADA is to require relatively few changes to existing buildings, but to impose extensive design requirements when buildings are modified or replaced.") *Cf. Rose v. United States Postal Service*, 774 F.2d 1355, 1361 (9th Cir. 1984) (Duty to comply with Architectural Barriers Act not abrogated by "high costs" which were avoidable by compliance with the law).

equitable discretion to *permit* ongoing violations of the ADA, but they will also be able to affix a *cost* to the equitable licensing of violations by requiring disgorgement of the profits occasioned by maintenance of the ongoing violation.

It is clear that disgorgement is "preventive" in its effect: "[T]he order of disgorgement may serve to deter future violations. As the Supreme Court has noted in a similar context: 'Future compliance may be more definitely assured if one is compelled to restore one's illegal gains.'" *Commodity Futures Trading Commission v. CO Petro Marketing Group, Inc.*, 680 F.2d 573, 583 (9th Cir. 1982), quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 400 (1946). See also, *U.S. v. Bonano Organized Crime Family*, 683 F. Supp. 1411, 1448-1449 (E.D.N.Y. 1988) ("disgorgement has been found to be an appropriate, non-punitive, ancillary equitable remedy in the securities and commodities law area which deprives wrongdoers of their ill-gotten gains and deters future violations.").

Unlike damages, the purpose of disgorgement is not to "make whole" the aggrieved parties. Rather, "the purpose of disgorgement is to deprive a person of 'ill-gotten gains' and prevent unjust enrichment." *Hateley v. S.E.C.*, 8 F.3d 653, 655 (9th Cir. 1993).

The focus on the activity of the violator (and not the injury to the aggrieved party) is emphasized when considering to whom disgorgement is paid: "Once the primary purpose of disgorgement has been served by depriving the wrongdoer of ill-gotten gains, the district court has broad discretion in determining the disposition of the disgorged funds." *S.E.C. v. First Pacific Bancorp*, 142 F.3d 1186, 1192 (9th Cir. 1998). Similarly, disgorgement is not rendered unavailable by the mere fact that it is only the

violator's financial gain[9] that is at issue (and not any pecuniary loss on the part of the persons whose rights have been violated). See, e.g., *Edwards v. Lee's Administrator*, 96 S.W.2d 1028, 1032 (Ky. 1936) (ordering an accounting for profits to owners of land with a cavern beneath where neighbors with access to the cavern had given tours of the cave for hire without compensating the landowners). See also, *U.S. v. Bonano Organized Crime Family*, 683 F. Supp. 1411, 1449 (E.D.N.Y. 1988) citing *S.E.C. v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987) ("the primary purpose of disgorgement is to prevent unjust enrichment regardless of whether any victims are entitled to damages.")

VII. Conclusion

"The plain language of [42 U.S.C.] 12188(a)(1) is clear and unambiguous, and it can be understood without reference to any other statutory provision." *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000). The grant of jurisdiction for injunctive relief and "other orders" provided in 42 U.S.C. 2000a-3(a) presumptively includes *all* forms of equitable relief *ancillary to* injunctions. No limitation (and certainly no *clear* limitation) of equitable jurisdiction has been set forth by Congress. Just as awards of back pay are complementary to reinstatement, so are awards of disgorgement complementary to injunction: the ancillary relief covers the period of time *prior to* the district court's ordering the injunctive relief and removes the incentive that a violator of the civil rights law otherwise has to postpone

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[9] Or, perhaps more accurately, "negative unjust enrichment" which consists of the unjust avoidance of a loss. See, *Reich v. Continental Casualty Co.*, 33 F.3d 754, 756 (7th Cir. 1994) (citing 1 Dan R. Dobbs, Law of Remedies § 509, pp. 802-03 (2d ed. 1993); Dan B. Dobbs, Handbook on the Law of Remedies: Damages-Equity-Restitution § 4.5, p.278 (1973))

compliance with the law. Such effect is clearly "preventive" and is consonant with the prompt enforcement of Title III of the ADA. Clearly, the district court should be allowed to exercise its equitable discretion in this case to award complete relief.

Respectfully Submitted this 11th day of June, 2001.

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